(10)

Supreme Court, U.S.
FILED
DEC 2 1998
CLERK

No. 97 - 1868

In The
Supreme Court of the United States
October Term, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,
v.
JOHN E. WARD,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Of Counsel:
See inside front cover

Michael E. Malamut
Counsel of Record
Loretta M. Smith
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

Counsel for Amici Curiae

27 pp

Of Counsel:

Jan Amundson
General Counsel
Quentin Riegel
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, D. C. 20004-1790
(202) 637-3000

Stephen A. Bokat
Sussan Mahallati Kysela
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

James A. Klein
Association of Private
Pension and Welfare Plans
1212 New York Avenue, N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit erred in holding that California's "notice-prejudice" common law rule is not preempted by ERISA when the rule "relates to" ERISA plans and does not spread the risk of loss.

2. Whether the United States Court of Appeals for the Ninth Circuit erred in holding that California's common law Elfstrom rule does not "relate to" an ERISA plan and is, therefore, not preempted by ERISA when the rule alters the written terms of the plan and creates fiduciary duties which are contrary to those set forth in ERISA and which the parties did not agree to create.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE NINTH CIRCUIT ERRED IN IMPOSING TWO CALIFORNIA COMMON LAW RULES ON THE ADMINISTRATION OF ERISA PLANS THEREBY DISRUPTING THE UNIFORMITY OF REGULATION THAT ERISA SOUGHT TO ENSURE 5

II. CALIFORNIA'S "NOTICE PREJUDICE" RULE WHICH "RELATES TO" AND DISRUPTS ERISA PLANS IS PREEMPTED 8

III. THE *ELFSTROM* RULE "RELATES TO" ERISA PLANS AND IS PREEMPTED. 14

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Bass v. John Hancock Mutual Life Ins. Co., 10 Cal.3d 792, 518 P.2d 1147, 112 Cal. Rptr. 195 (1974) 16

Bozeman v. Connecticut General Life Ins. Co., 301 U.S. 196 (1937) 14

Cisneros v. UNUM Life Ins. Co. of America, 134 F.3d 939 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3035 (U.S. May 20, 1998) (No. 97-1867) 7, 9

Elfstrom v. New York Life Ins. Co., 37 Cal.2d 503, 432 P.2d 731, 63 Cal Rptr. 35 (1967) ..... 14 n.3, passim

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 5, 6

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 8, 13

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 10

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 17

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) ... 11, 13

Shaw v. Delta Air Lines, Inc., 362 U. S. 85 (1983) .. 5, 6, 19

Ward v. Management Analysis Co. Employee Disability Benefit Plan, 135 F.3d 1276 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3257 (Oct. 13, 1998) (No. 97-1868) ... 8-9, 17

STATUTES

29 U.S.C. §§ 1001 et seq. 5

29 U.S.C. § 1002 16

29 U.S.C. § 1102 18

29 U.S.C. § 1104 ..... 12, 15 n.4

29 U.S.C. §1105 ..... 15, 18

29 U.S.C. § 1132 12

29 U.S.C. §1144 9

REGULATIONS

29 C.F.R. § 2560.503-1 12

RULES

Supreme Court Rule 37 ..... 1 n.1, 3

MISCELLANEOUS

Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 2359 (Comm. Print 1976) 11, 15

Barry R. Ostrafer & Thomas R. Newman, Handbook on Insurance Coverage Disputes (9th ed. 1998) 11

Restatement (Second) of Agency 18 n.6, 19 n.7

No. 97 - 1868

In The
Supreme Court of the United States
October Term, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,
v.
JOHN E. WARD,
Respondent.

On Writ of Certiorari to The
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The Association of Private Pension and Welfare Plans ("APPWP") is a broad-based, non-profit trade association

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

founded in 1967 to protect and foster the growth of the private employer-sponsored employee benefit plan system in the United States. The members of the APPWP include both small and large employer sponsors (including many Fortune 500 companies) of employee benefit plans, as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 240 members sponsor or administer plans covering more than 100 million plan participants. This broad-based membership provides the APPWP with substantial expertise and experience with respect to the entire spectrum of issues relating to all types of benefit plans. The APPWP has filed *amicus curiae* briefs in numerous cases involving important issues for the employee benefit plan community.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including numerous ERISA cases. See, e.g., California Div. of Labor Standards v. Dillingham Construction, N.A., Inc., _ U.S. _, 117 S. Ct. 832 (1997); Lockheed Corp. v. Spink, 517 U.S. 882 (1996); Varity Corp. v. Howe, 516 U.S. 489 (1996); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990); and FMC Corp. v. Holliday, 498 U.S. 52 (1990).

The National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial

trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977. Its membership consists of corporations, individuals, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. See, e.g., Lockheed Corp. v. Spink, 517 U.S. 882 (1996); Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997); Cigna Health Plan of Louisiana v. Louisiana, 82 F.3d 642 (5th Cir. 1996).

Amici are concerned that, if allowed to stand, the decision below will create and foster conflicting federal and state regulation of ERISA plans to the great detriment of those employers and their employees who rely on the availability of group insurance plans to provide employee health and welfare benefits.

Pursuant to Supreme Court Rule 37.2, counsel for *amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amici accept and adopt the Statement of the Case contained in the Brief of the Petitioner UNUM Life Insurance Company of America ("UNUM").

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously concluded that two California common law rules that are inconsistent with ERISA and contrary to the express terms of an ERISA plan are not preempted. Application of these common law rules to claims for benefits by California plan participants destroys the uniformity of plan administration that Congress intended and prohibits multi-state employers from providing the same benefits to all plan participants. The added burdens that the Ninth Circuit recognized its holding imposed on plan administrators may lead to the reduction of benefits, a result that Congress sought to avoid by enacting ERISA's preemption provision.

California's "notice-prejudice" rule relates to ERISA plans, as the Ninth Circuit correctly recognized. The Ninth Circuit, however, erred in holding that this common law rule was saved from preempted as a law which regulates insurance. The "notice-prejudice" rule does not spread the risk of loss and conflicts with substantive provisions of ERISA. Application of the "notice-prejudice" rule alters the express terms of ERISA plans and would result in the payment of benefits to California plan participants that are precluded by the express terms of the plan. The Ninth Circuit's holding supplants ERISA's enforcement provisions and is, therefore, preempted.

Similarly, California's Elfstrom rule, which holds that an employer acts as the agent of the insurer when it undertakes administrative tasks necessary to effectuate insurance for its employees, relates to ERISA plans because it alters the terms of those plans. The Elfstrom rule alters the allocation of fiduciary responsibilities set forth in ERISA plans and creates respondeat superior liability that ERISA itself does not impose. Because it conflicts with ERISA and destroys the uniformity of plan administration that Congress intended to achieve, California's Elfstrom rule is preempted.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN IMPOSING TWO CALIFORNIA COMMON LAW RULES ON THE ADMINISTRATION OF ERISA PLANS THEREBY DISRUPTING THE UNIFORMITY OF REGULATION THAT ERISA SOUGHT TO ENSURE.

At issue is whether ERISA, 29 U.S.C. §§ 1001 et seq., preempts two California common law rules which are inconsistent with the express terms of a written ERISA plan and which, if applied as envisioned by the United States Court of Appeals for the Ninth Circuit, would result in the provision of disability benefits that the plan would prohibit. If the decision below is not reversed, plan participants who fail to follow the claims initiation and processing procedures set forth in their benefits plans will be encouraged to turn to state law to attempt to alter or nullify those terms and to supplant ERISA's enforcement provisions through the application of state law. The resulting chaos and increased costs of insured plans which will be created by conflicting state and federal regulation of ERISA plans was precisely what ERISA preemption attempted

to avoid.

This Court has repeatedly emphasized that Congress designed ERISA's preemption provision, 29 U.S.C. §1144(a), to "eliminat[e] the threat of conflicting and inconsistent State and local regulation" of ERISA plans. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987), *quoting* 120 Cong. Rec. 29197 (1974) (remarks of Representative Dent). See, e.g., Shaw v. Delta Air Lines, Inc., 463 U. S. 85, 105 (1983). This Court has also repeatedly explained why Congress believed it was necessary to eliminate "conflicting and inconsistent State and local regulation":

> The most efficient way to meet [the responsibilities of administering an employee benefit plan] is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some states but not in others; *to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.*

Fort Halifax Packing Co. 482 U.S. at 9 (emphasis added).

Yet under the Ninth Circuit's decision, California participants in an employer's multi-state plan will be entitled to disability benefits that participants in other states, with different

common law rules regarding notice and imputed agency, will not be entitled to receive. As a result, multi-state employers will be precluded from offering uniform benefits to their employees throughout the country. This Court has recognized that ERISA attempted to avoid placing employers in such an untenable position:

> To offset the additional expenses [necessarily incurred by complying with conflicting state laws], the employer presumably would reduce wages or eliminate those benefits not required by any State. Another means by which the employer could retain its uniform nationwide plan would be by eliminating classes of benefits that are subject to state requirements with which the employer is unwilling to comply. *ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans.*

Shaw, 463 U.S. at 105 n.25 (emphasis added). Achieving uniformity is so central to ERISA's goals, that this Court has "not hesitated to enforce ERISA's pre-emption provision where state law created the *prospect that an employer's administrative scheme would be subject to conflicting requirements."* Fort Halifax Packing Co., 482 U.S. at 10 (emphasis added). This Court should not hesitate to strike down the conflicting claims-processing rules which the Ninth Circuit sanctioned, "fully cognizant of the complications and extra burdens" that at least one of these common law rules would create for insurers and employers. Cisneros v. UNUM Life Ins. Co. of America , 134 F.3d 939, 947 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3035 (U.S. May 20, 1998) (No. 97-1867). "Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries." Ingersoll-Rand Co. v.

McClendon, 498 U.S. 133, 142 (1990).

As demonstrated in the following sections, ERISA preempts both California common law rules.

II. CALIFORNIA'S "NOTICE PREJUDICE" RULE WHICH "RELATES TO" AND DISRUPTS ERISA PLANS IS PREEMPTED.

John Ward, former president and CEO of Management Analysis Company ("MAC"), applied for benefits under a long-term disability insurance policy (the "Plan") sponsored by MAC and issued by UNUM. Ward v. Management Analysis Co. Employee Disability Benefit Plan, 135 F.3d 1276, 1278 (9th Cir. 1998). UNUM denied the claim as untimely. Id. Under the terms of the Plan, Mr. Ward was required to give UNUM written notice of his claim no later than 18 months after the onset of his disability. Id. at 1280. Although Mr. Ward claimed that his disability first began on May 5, 1992, while he was still employed by MAC, he did not submit any notice of claim to UNUM until April 11, 1994 — more than 23 months after the alleged onset of the illness and more than 5 months after the proof-of-claim deadline. Id.

Mr. Ward sued UNUM claiming that California's "notice-prejudice rule" precluded UNUM from denying his claim as untimely. Id. at 1279. He also claimed that, under California's Elfstrom rule, MAC should be considered UNUM's agent and, therefore, his alleged notice to MAC of his disability constituted notice to UNUM. Id. at 1281. The U.S. District Court for the Southern District of California granted UNUM's motion for summary judgment, holding that the two common law rules were preempted by ERISA. Id. at 1279.

The Ninth Circuit reversed. Id. at 1289.

The Ninth Circuit held that, under the express terms of the Plan, "timely submission of proof [of claim] is a condition precedent to payment of benefits." Ward, 135 F.3d at 1280. Mr. Ward did not give UNUM written notice of his claim within the time limits set forth in the Plan. The Ninth Circuit excused his failure to comply with the Plan's terms by applying California's "notice-prejudice" common law rule. Under the Ninth Circuit's formulation of the California rule, "the insurer of an ERISA benefit plan may not deny benefits by reason of untimely notice or submission of proof of claim unless the insurer proves it suffered actual prejudice because of the delay."[2] Id.

The Ward court relied on its reasoning in a companion case, Cisneros v. UNUM Life Ins. Co. of America, 134 F.3d 939 (9th 1998), *petition for cert. filed*, 67 U.S.L.W. 3035 (U.S. May 20, 1998) (No. 97-1867), to hold that the "notice-prejudice" rule is not preempted by ERISA. While recognizing that the "notice-prejudice" rule "relates to" an employee benefit plan, the Ninth Circuit held that it fell within ERISA's "savings clause" and was, therefore, "exempt from preemption." Id. at 944.

ERISA's "savings clause" exempts from preemption any state law which "regulates insurance." 29 U.S.C. § 1144 (b)(2)(A). To determine whether a state law "regulates

---

2. "Prejudice is not presumed from the delay alone, . . . and the insurer must show *actual* prejudice, not the mere possibility of prejudice, in order to avoid liability." Cisneros v. UNUM Life Ins. Co. of America, 134 F.3d 939, 944 (1998) (citation omitted; emphasis in original).

insurance," the Court considers "a common-sense view of the matter," Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985), and the three criteria developed under the McCarran-Ferguson Act concerning the meaning of the phrase "business of insurance":

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities in the insurance industry.

Id. at 743, *quoting* Union Labor Life Ins. Co. V. Pireno, 458 U.S. 119, 129 (1982) (emphasis omitted). The Ninth Circuit concluded that, although the "notice-prejudice" rule does not spread the policyholder's risk of loss, it satisfies the two other McCarran-Ferguson criteria: it is directed at the insurance industry and forms "an integral part of the relationship between the insurer and the insured." Cisneros, 134 F.3d at 946-47. The Ninth Circuit held that a law need not satisfy all three McCarran-Ferguson criteria to be preempted. Id. at 946. Moreover, it rejected the view that spreading the risk of loss is indispensable to a finding that a state law regulates insurance. Id.

As Petitioner UNUM's Brief demonstrates, to be saved from preemption a state law must satisfy all three McCarran-Ferguson criteria and California's "notice-prejudice" rule does not. *Amici* would add a practical argument to UNUM's legal argument. If a state law may be saved from preemption when it is not a law that spreads the risk of loss, it will be virtually impossible for Plan Administrators and claims processors to predict with any degree of certainty whether a state law which clearly relates to an ERISA plan is preempted. Such a result

would fly in the face of Congress's intent:

> The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

H.R. Rep. No. 93-533 at 12 (1973), reprinted in 2 Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 2359 (Comm. Print 1976) ("Legislative History"). The Ninth Circuit's analysis, if affirmed, would not only require "reference to varying state laws," it would greatly reduce the ability of plan administrators "to predict the legality of proposed actions." Indeed, because "notice-prejudice" rules are replacing the traditional rule in some states, see Barry R. Ostrafer & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 4.02 [c][2] (9th ed. 1998), "predicting the legality of proposed actions" will be impossible.

There is a more fundamental reason for preemption here. A state law that conflicts with any of ERISA's substantive provisions is preempted. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-57 (1987). The Ninth Circuit recognized that there was a direct conflict between ERISA and the notice-prejudice rule, noting that the rule caused "a plan's written terms [to be] altered," caused "complications and extra burdens" on plan administration, and made the plan "more difficult to administer" because the rule "differ[s] markedly in various states." Id. at 947. The Court nonetheless held that the common law rule was not preempted.

These conflicts alone require a holding that the "notice-prejudice" rule is preempted. ERISA requires fiduciaries to

discharge their duties "in accordance with the documents and instruments governing the plan," 29 U.S.C. § 1104 (a)(1)(D). It does not provide that fiduciaries discharge their duties "in accordance with the documents and instruments governing the plans as those instruments may be altered by the varying common law of the fifty states." In addition, ERISA permits "a participant or beneficiary" to "recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132 (a)(1)(B). No benefits were "due" Mr. Ward "under the terms of his plan." The "notice-prejudice" rule supplants this enforcement provision by entitling Mr. Ward to benefits that are not "due" under the Plan.

Moreover, while ERISA does not dictate any particular claims processing procedure, the Department of Labor's regulations set forth some minimum requirements. As to claims initiation and processing, the regulations provide, in pertinent part:

> Every employee benefit plan shall establish and maintain reasonable claims procedures.
>
> (1) A claims procedure *will be deemed reasonable* only if it:
>
> . . .
>
> (ii) Is described in the summary plan description . . . .
>
> (iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims . . . .

29 C.F.R. § 2560.503-1(b)(1)(ii) & (iii) (emphasis added). The claim initiation and processing procedures are set forth in the Plan Summary, see Petition at 42a-47a, and the 18-month

period to file a proof of claim does not "unduly hamper" the initiation of a claim. Indeed, Mr. Ward did not claim that the time limits set forth in the written Plan inhibited the initiation of his disability claim. Had he done so, the Ninth Circuit would have been required to look to federal common law to determine if the time limit was unreasonable, as Congress intended. See Pilot Life Ins. Co., 481 U.S. at 56, *quoting* 120 Cong. Rec. 29933 (remarks of Senator Javits) ("[i]t is also intended that a body of Federal substantive law be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans"). Indeed, as this Court noted, Congress determined that the development of federal common law was preferable to permitting state law to supplant ERISA's enforcement provisions:

> The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.

Id. The Ninth Circuit erroneously ignored this instruction and permitted the "notice-prejudice" rule to supplant ERISA's enforcement provisions.

Finally, as noted above, permitting the "notice-prejudice" rule to revive a claim barred by the written terms of an ERISA plan conflicts with the purpose of ERISA "to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." Ingersoll-Rand Co., 498 U.S. at 142.

For this reason as well, California's "notice-prejudice" rule is preempted.

III. THE *ELFSTROM* RULE "RELATES TO" ERISA PLANS AND IS PREEMPED.

More than fifty years ago, this Court explained the typical relationship between the employer and the insurer of an insured employee benefit plan:

> Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like. When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but for themselves.

Bozeman v. Connecticut General Life Ins. Co., 301 U.S. 196, 204-05 (1937). California's Elfstrom rule[3] takes a contrary view and deems the employer the agent of the insurer when the employer administers an insured plan. As demonstrated below, the Elfstrom rule conflicts with ERISA and is preempted.

Congress permitted co-fiduciaries of ERISA plans to

3. Elfstrom v. New York Life Ins. Co., 37 Cal.2d 503, 432 P.2d 731, 63 Cal Rptr. 35 (1967).

"allocate responsibilities among themselves and, by so doing, generally limit their liability to the extent of their specified duties." S. Rep. 93-127 at 34 (1973), reprinted in 1 Legislative History 620. Accordingly, ERISA provides:

> (1) the instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries . . . .

29 U.S.C. §1105(c). ERISA insulates co-fiduciaries from liability for the acts or omissions of other co-fiduciaries unless the co-fiduciary:

> participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> . . . by his failure to comply with section 404(a)(1)[4] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> . . . has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

4. Section 404 (a) of ERISA, 29 U.S.C. § 1104(a)(1) requires a plan fiduciary to discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries."

29 U.S.C. §1105(a). ERISA thus imposes personal liability on fiduciaries; it does not create respondeat superior liability.

Consistent with these provisions, MAC was designated as the Plan Sponsor and Plan Administrator. 29 U.S.C. § 1002 (16)(A) & (B). MAC's duties under the Plan included providing UNUM "information relative to employees . . . who qualify to become insured; . . . whose amounts of insurance change; and/or . . . whose insurance terminates." Petition at 42a. The Plan also provided that MAC "acts on its own behalf or as agent of the employee" and not UNUM's agent absent "written authorization."[5] Id. at 44a. Under the terms of the Plan, UNUM was responsible for receiving, processing, and paying claims under the terms of the Plan. See id at 42a-44a. The Plan unambiguously required participants to provide UNUM, not MAC, "written notice of claim" within the time limits set forth in the Plan. Id. at 42a.

Mr. Ward did not provide written notice of his claim to UNUM during the time limits set forth in the Plan. Rather, he contended that MAC became aware of his disability and could be considered UNUM's agent pursuant to California's Elfstrom rule for purposes of determining whether notice was timely. Under the Elfstrom rule "the employer is the agent of the insurer in performing the duties of administering group. . . policies." Bass v. John Hancock Mutual Life Ins. Co., 10 Cal.3d 792, 518 P.2d 1147, 1150, 112 Cal. Rptr. 195, 198 (1974). According to the Ninth Circuit, the Elfstrom rule may make MAC an agent of UNUM for the purpose of receiving

5. The Plan provides: "For purposes of this policy, the policyholder acts on its own behalf or as agent of the employee. Under no circumstances will the policyholder be deemed the agent of the Company without a written authorization." Petition at 44a.

notice notwithstanding the express language in the Policy that MAC is not UNUM's agent and notwithstanding the contrary allocation of fiduciary responsibilities in the Plan.

Despite the drastic rewriting of the Plan that the Elfstrom rule would impose, the Ninth Circuit held that this common law rule does not "relate to" ERISA plans and is, accordingly, not preempted. Relying on New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995), the court held that the Elfstrom rule does not "mandat[e] employee benefit structures or their administration" and did not "provid[e] alternative enforcement mechanisms." Ward, 135 F.3d at 1287. Ignoring the fact that the application of the Elfstrom rule would result in the payment of benefits that the written terms of the Plan precluded, the Ninth Circuit reasoned it was not preempted because:

> Elfstrom does not dictate the benefits to be provided or the manner in which the plan will be administered. Elfstrom does not require an employer to participate in the administration of a group insurance policy or an insurer to delegate its functions to an employer. Nor does Elfstrom create an "alternative enforcement mechanism" for ERISA plan obligations beyond those set forth in the statute.

Id. at 1287 (footnote omitted). There is no substance to this reasoning.

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw, 463 U.S. at 96-97. While some state laws "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding

that the law 'relates to' the plan," id. at 100 n. 21, the Elfstrom rule is not such a law. By deeming the employer to be the unwilling agent of the insurer, the Elfstrom rule clearly dictates the manner in which the plan will be administered because it substitutes oral or written notice to the employer for the written notice of claim to the insurer that is required by the express terms of the Plan. The rule also creates an "alternative enforcement mechanism" because it allows a participant to receive benefits without complying with the Plan as written and would require the payment of benefits when the express terms of the Plan preclude such payment. Put simply, the Elfstrom rule "relates to" the Plan because it changes the Plan.

Moreover, the Elfstrom rule conflicts with the terms of ERISA. ERISA requires a written plan which designates the named fiduciaries and permits the named fiduciaries to delineate their respective duties and responsibilities. 29 U.S.C. § 1102(a)(1); id., § 1105(c)(1). Unless the plan provides procedures for delegating a fiduciary's duty to another fiduciary or person, those duties may not be delegated. Id., §1105(c)(2). The Elfstrom rule flouts these provisions. Through its imputation of an agency relationship, the rule creates a fiduciary[6] and assigns that fiduciary duties and responsibilities that he did not agree to undertake or perform.

In addition, the Ninth Circuit's rationale for the imposition of the Elfstrom rule ignores reality. While the Ninth Circuit characterizes the employer's provision of employee information, which is necessary to effectuate the insurance, as

---

6. "Agency is the fiduciary relation which results from the manifestation of consent by one party to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1.

the "function" of the insurer, that information is peculiarly in the hands of the employer, not the insurer. It is the employer, not the insurer, who knows that a new employee has begun employment and the terms of that employment.[7] To avoid the unintended creation of an agency relationship under the Elsftrom rule, insurers would be required to uncover or develop this information without relying on the employer, adding significant costs to the administration of ERISA plans to the detriment of employers and their employees.

ERISA sought to encourage employers to offer and insure employee benefit plans. Multi-state employers will be unable to offer a single national plan if varying common law rules of the fifty states can be used to circumvent the express terms of benefit plans. Congress did not intend this result when it enacted ERISA and its "crowning achievement," the preemption provision. Shaw, 463 U.S. at 99 *quoting* 120 Cong. Rec. 29197 (1974) (remarks of Representative Dent).

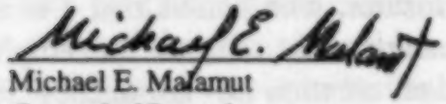
CONCLUSION

For the reasons stated above, this Court should reverse the Ninth Circuit and remand with instructions to affirm the summary judgment in favor of UNUM and the Plan.

---

7. Even assuming that the employer were the agent of the insurer for the tasks the Ninth Circuit identified, the employer would not automatically become the agent of the insurer for the purpose of receiving a participant's notice of claim. Restatement (Second) of Agency § 1, illus. 3.

Respectfully submitted,



Michael E. Mafamut
Counsel of Record
Loretta M. Smith
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

Counsel for Amici Curiae

Of Counsel:
Jan Amundson
General Counsel
Quentin Riegel
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, D. C. 20004-1790
(202) 637-3000

Stephen A. Bokat
Sussan Mahallati Kysela
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

James A. Klein
Association of Private Pension
and Welfare Plans
1212 New York Avenue, N.W.
Suite 1250
Washingon, D.C. 20005
(202) 289-6700